83-1309

NO.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

V.

GEORGE UPTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MASSACHUSETTS.

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QUESTION PRESENTED

Whether probable cause for issuance of a search warrant is established under a properly applied "totality of the circumstances" standard, when an informant's statement reveals that stolen items, which she has seen and describes, are in the defendant's mobil home and are about to be moved; that the defendant lives at a particular verified address; and that the movement of the items is in response to a related police raid conducted only hours before, which is not commonly known.

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OPINION BELOW

The opinion of the court below (App. A.) is reported at 390 Mass. 562 (1983); _____N.E.2d_____.

JURISDICTION

The decision of the court below was entered on December 12, 1983. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOKED

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On October 7, 1980 a Barnstable County Grand Jury returned three indictments naming George Upton on theft-related charges. On March 10, 1981, five additional indictments were returned against Upton. Two evidentiary hearings were held on motions to suppress the evidence seized on

September 11, 1980, following the return of each set of indictments. Both motions were denied with written memoranda. (App. B, p. 1 and p. 13).

After trial, the respondent was found guilty of two counts of breaking and entering in the daytime with intent to commit a felony, two counts of larceny from a building, seven counts of receiving stolen property, unlawful possession of fireworks and unlawful possession of an interception device.

On appeal, the Supreme Judicial Court reversed judgment, holding that "under controlling principles announced by the Supreme Court of the United States, the search was unreasonable ... because there was no demonstrated probable cause to issue the search warrant." Commonwealth v. Upton, 390 Mass. 562, 563 (1983) (App. A).

STATEMENT OF THE FACTS

On September 11, 1980, at approximately 12:00 p.m., Lieutenant Beland of the Yarmouth Police Department engaged in a search of a motel room registered to a Christine Higgins and reserved by Richard Kelleher. Among the items seized were credit cards in the names of Dr. Austin O'Malley and J. Pendergast; people who had reported thefts on September 4, 1980 and September 10, 1980, respectively, of, among other things, jewelry, silver and gold. The credit cards were turned over to Officer Tamash, who had the theft reports describing the property stolen from the O'Malley and Pendergast homes.

At approximately 3:20 p.m., Lieutenant Beland received a telephone

call from an unnamed woman who stated that a motor home parked behind the home of George Upton and his mother, at 5 Jefferson Avenue, was filled with stolen items, and that George Upton was about to move the items because he knew about the "raid" on Kelleher's motel room. The woman told Beland that Upton had purchased the stolen items from Kelleher. The caller said she had seen the items and that they consisted of jewelry, silver, gold, television sets, and narcotics. She refused to identify herself because, she said, she feared Upton would "kill" her, but when Beland suggested that she was Lynn Alberico, she assented and expressed surprise that Beland knew who she was. She said she had broken up with Upton and now wanted to "burn" him. Beland had been introduced to Lynn Alberico by George

Upton some four months earlier. Upton had referred to her as his girlfriend. The caller refused to give Beland her address or telephone number.

Following the call, Beland drove to 5 Jefferson Avenue and observed a motor home parked on the property. He then prepared an affidavit requesting a warrant to search the home, motor home, and all vehicles on the premises of 5 Jefferson Avenue. The affidavit included all of the information recited above. Beland attached the Pendergast and O'Malley breaking and entering reports and the lists of stolen property to the affidavit and took it to a magistrate who issued a search warrant, having found "probable cause for believing that certain property has been stolen, ... - certain property has been concealed to prevent a crime from being

discovered - certain property is unlawfully possessed or kept concealed for an unlawful purpose." Memorandum of Decision on Motion to Suppress, (App. B., p. 13).

The details of the subsequent search and seizure are set out in the Memoranda of the Superior Court judges who denied the defendant's two motions to suppress the evidence seized on September 11, 1980. (App. B, p. 1, and p. 13). Among the items seized and introduced at trial were jewelry, silver and gold.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW REPRESENTS A FUNDAMENTAL MISCONSTRUCTION OF THE NEW TEST FOR PROBABLE CAUSE SET OUT IN ILLINOIS V. GATES, 103 S.Ct. 2317 (1983).

The Supreme Judicial Court, in seeking to construe Gates as narrowly as

possible, ignores this Court's stated intention to establish an approach to the probable cause analysis of an affidavit containing an informant's tip that is different from the Aguilar-Spinelli two-pronged test.

> "It is not clear that the Gates opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants. Looking at what the court did on the facts before it, and rejecting an expansive view of certain general statements not essential to the decision, we conclude that the Gates opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards." Commonwealth v. Upton, 390 Mass. 562, 568. (emphasis added).

This construction of the Gates holding is at odds with a "totality of circumstances" approach to the determination of probable cause. It

incorrectly implies what the remainder of the opinion makes explicit; that the rigid two-pronged analysis remains intact, with minor alteration, permitting consideration of a corroboration factor.

A. The Court Below Applied A Supplemented Aguilar-Spinelli Test Instead Of The Totality Of Circumstances Test Required By This Court.

The Supreme Judicial Court reviewed the affidavit upon which a magistrate had based a finding of probable cause to issue a search warrant and concluded:

> "... the limited police corroboration of the informant's statements set forth in the affidavit and the informant's statements themselves did not warrant a finding of probable cause." Id. at 572.

In reaching this conclusion the court below applied, in the name of a "totality of circumstances" test under

Illinois v. Gates, supra, a modified version of the now defunct Aquilar-Spinelli two-pronged test for determining probable cause on the basis of an informant's tip. The court examined the informant's statements in the affidavit for the "basis of knowledge" that the stolen property was in the defendant's motor home and found such basis "not forcefully apparent." Id. at 569.

> "The 'basis of knowledge' element might qualify for a passing mark ... but the strength of this element isn't sufficient to bolster deficiencies..." Id. at 569.

It appears that the court considered the "totality of circumstances" approach set forth in Gates to require only a few minor adjustments to the old test: if one prong is lacking it may be compensated for by a sufficiently strong

second prong (Commonwealth v. Upton, 390 Mass. 562, 569); the corroboration of pieces of the informant's information may be used to bolster the veracity of the tip.[1/]

The court continued its Aguilar-Spinelli type analysis by turning to the veracity prong and finding that it too is lacking.

> "None of the common bases for determining the credibility of an informant or the reliability of her information is present here." Id. at 569.

The court discounted the corroborated information, finding it insufficient to compensate for the weakness of the two prongs, and concluded that probable

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1/ The "bolstering" of a prong in this manner was permissible prior to Gates, as a way of meeting the two-pronged test. Spinelli v. United States, 393 U.S. 410, 415, (1969).

cause should not have been found. Id. at 572-573. The entire analysis took place within the framework of the "abandoned" two-pronged test. The Supreme Judicial Court did not consider the contents of the affidavit in its totality, giving significance to each relevant piece of information as it is required to do under Gates. Instead, the court persisted in plugging all information contained in the affidavit into the old formula.

This Court was quite clear in Gates that it had "abandoned" the Aguilar-Spinelli two-pronged test, and replaced it with the more reasoned "totality of circumstances" approach to determining probable cause.

> "The task of the issuing magistrate is simply to make a practical, common-sense

> decision whether, given all the circumstances set forth in the affidavit before him... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 103 S.Ct. 2317, 2332. (emphasis added).

This Court did not suggest that the circumstances contained in the affidavit apart from the informant's tip, should be considered only as they effectively bolster a prong, or make one prong so strong as to render the sufficiency of the other unnecessary. Yet, it is on this erroneous basis that the Supreme Judicial Court rendered its decision in the instant case. Such an approach contravenes the very essence of the reasoning in Gates: that the two prongs are not "separate and independent requirements", but rather, they are "closely intertwined issues"; and that "probable cause is a fluid concept ...

not ... usefully reduced to a neat set of legal rules." Id. at 2328.

B. The Court Below Is Obliged To Follow The Law As Construed By This Court When Ruling On Fourth Amendment Issues.

The court below construes the requirements of the Fourth Amendment in a manner that is in conflict with the expressed position of this Court in Illinois v. Gates. State courts are obliged to follow the decisions of this court in passing on federal questions. Oregon v. Mathiason, 429 U.S. 492 (1977). In the interest of the fair and consistent application of federal law by the States, this Court should review the decision of the court below.

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF OTHER STATE COURTS.

Unlike the Supreme Judicial Court, the Supreme Court of Wyoming has

rendered an opinion consistant with the ruling of this Court in applying a "totality of circumstances" approach to the determination of probable cause from an affidavit containing an informant's tip. In Bonsness v. Wyoming, 672 P.2d 1291 (Wyo. 1983)[2/] a man arrested for an attempted vehicular break-in informed police that he had purchased marijuana from a man named "Chad" in Chad's apartment and that more marijuana would be arriving at this apartment later in the day. The informant took the police to the vicinity of the apartment

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2/ Although the court's decision was based on a state constitutional provision, and therefore it was not compelled to rule in accordance with Gates, the provision is virtually identical to the Fourth Amendment of the United States Constitution. The Wyoming Court considers that "the decision in Illinois v. Gates, supra, supports this holding." 672 P.2d at 1293.

building and pointed out Chad's car. The police verified the ownership of the car and the address of "Chad", and the informant positively identified a picture of "Chad". On the basis of this information a magistrate found probable cause to issue a search warrant and the high court of Wyoming affirmed.

In reaching its decision the Wyoming Court considered the "totality of circumstances" included in the affidavit, rather than forcing each piece of information into the "basis of knowledge" or "veracity" prongs of the Aguilar-Spinelli test.

> "This test requires that the issuing officer weigh and consider all of the circumstances surrounding the issuance of a warrant." Id. at 1293.

The court considered that the corroboration of innocent details provided by the informant, combined with the fact that the tip was given against the informant's penal interest and upon his claim of personal knowledge, were sufficient to constitute probable cause to issue the search warrant. Id. The facts in the affidavit are taken altogether in the "common-sense, practical" manner envisioned by this Court in Gates. 103 S.Ct. at 2328.

Similarly, in Idaho v. Lang, 672 P.2d 561 (Idaho 1983), the Idaho Supreme Court applied a "totality of circumstances" analysis to an affidavit challenged on state constitutional grounds substantially the same as the language of Fourth Amendment to the United States Constitution. The informant in that case recited

information that was not readily predictable, as well as some easily obtained facts. The anonymous female caller told a state drug enforcement officer that: the defendant left Boise, Idaho that morning for Orlando, Florida; he was going to purchase cocaine in Orlando; he would be flying under an assumed name, from Boise to Denver, and then on to Orlando via Delta Airlines; and he owned a 1971 Volkswagon which was parked in the airport parking lot. She contended that all of this information was from personal knowledge. The agent verified the location of the car, the ticketing of the unusual flight route, and that no one was home at the defendant's address. In reviewing the magistrate's finding of probable cause, the court considered all of the information in the affidavit, rather

than seeking to determine which allegations could be made to fit into the "basic knowledge" or "veracity" categories. The court reiterated the facts, drawing parallels to the facts of Gates and concluded:

> "Applying the totality of the circumstances analysis to these facts, we conclude that a substantial basis for the magistrate's finding of probable cause existed." Id. at 563.

The application of the Gates analysis by the Supreme Courts of Wyoming and Idaho is in sharp contrast to the analysis employed by the court below. Review by this Court is required in order to establish consistency in the states' construction and application of Gates. Additionally, this Court's review is necessary in order that the improper precedent set by the Supreme

Judicial Court be remedied.[3]

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS[4]

The Fifth Circuit recently affirmed a police officer's finding of probable

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3/ A subsequent case decided by the court below has continued the court's misconstruction of Gates. See, Commonwealth v. Nowells, 390 Mass. 621, ____N.E.2d____ (1983).

4/ Of the six circuit cases decided on this issue since Gates, only the decision in United States v. Mendoza, No. 83-3040 (5th Cir. December 12, 1983) can be said to conclusively follow the "totality of circumstances" analysis. The decision in the other cases either would have been the same under the Aguilar-Spinelli test, or fail to explain the basis of their reasoning, and therefore do not sufficiently illuminate the course the courts would take in closer cases. The other cases are: United States v. Kolodziej, (5th Cir. 1983) 712 F.2d 975, United States v. Haimowitz, (11th Cir. 1983) 712 F.2d 457, United States v. Johnson, (11th Cir. 1983) 713 F.2d 654, United States v. Herrera, (11th Cir. 1983) 711 F.2d 1546, United States v. Ross, (8th Cir. 1983) 713 F.2d 389.

cause for a warrantless search of an automobile based on an informant's tip and police observance of a string of inconclusive "suspicious" activities. United States v. Mendoza, No. 83-3040 (5th Cir. Dec. 12, 1983). Relying on Gates in its approach, the court stated:

> "Unquestionably, no one item of the government's evidence, considered in isolation, would have been sufficient to justify a reasonable man in the belief that Mendonza's automobile contained contraband. Nonetheless, to experienced narcotics agents familiar with the methods employed by drug traffickers, the totality of circumstances, including the informant's tip, did establish probable cause to believe that Mendoza's car was being used to transport seizable contraband." Id. at 1301. (emphasis added).

The anonymous tip stated that Oscar Tabares, of a certain address and phone

number in Gretna, Louisiana, would be moving a shipment of cocaine from the New Orleans area to Miami over Labor Day weekend. Police surveillance produced accounts of meetings in hotel rooms, "erratic" driving and use of public telephones. Police also observed Tabares, Mendoza and a Ford stationwagon enter an unairconditioned warehouse for forty-five minutes, after which time a perspiring Mendoza was seen driving the Ford from the warehouse.

In concluding that there was probable cause to stop and search the automobile, the court quoted Gates:

> "[t]his may well not be the type of 'reliability' or 'veracity' necessary to satisfy some views of the 'veracity prong' of Spinelli but we think it suffices for the practical common-sense judgment called for in making a probable cause

> determination." Mendoza, supra, at 1301 citing Gates, 103 S.Ct. at 2335.

As the decisions in Mendoza and the previously discussed state courts' holdings show, the Gates test is not so "shapeless and permissive", Commonwealth v. Upton, 390 Mass. 562, 574, as to preclude a reasoned and consistent approach to the determination of probable cause. Therefore, it is respectfully urged that this Court review the decision of the court below in the interest of the proper, just and even-handed application of federal law.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari to review the judgment of the Supreme

Judicial Court of the Commonwealth of Massachusetts should be granted.

Respectfully submitted,

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APPENDIX A

390 Mass. 562

COMMONWEALTH vs.
GEORGE L. UPTON.

WILKINS, J. The defendant, in his appeal from numerous convictions, principally challenges the lawfulness of a search conducted pursuant to a search warrant. He asserts that the affidavit presented in support of that search warrant failed to establish probable cause to issue it. The search produced substantial amounts of stolen property that led to the several indictments on which the defendant was convicted. We conclude that, under controlling principles announced by the Supreme Court of the United States, the search was unreasonable in violation of the Fourth Amendment to the Constitution of the United States because there was no

demonstrated probable cause to issue the search warrant. We thus reverse the convictions.[1/]

About noon on September 11, 1980, Lieutenant Beland of the Yarmouth police department assisted in the execution of a search warrant for a room at the Snug Harbor Motel in West Yarmouth. The search warrant mentioned one Kelleher. The police found various items, some containing the name of one Pendergast

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1/ We allowed the Commonwealth's application for direct appellate review, to which the defendant assented.

The defendant was convicted on two counts of breaking and entering in the daytime with intent to commit a felony, two counts of larceny from a building, seven counts of receiving stolen property, unlawful possession of fireworks, and unlawful possession of an interception device (see G.L. c. 272 §99).

whose premises had been burglarized earlier that month. In the middle of the afternoon, Beland received a telephone call from an unidentified woman who, according to Beland's affidavit in support of the warrant, said that "a motor home full of stolen stuff [is] parked behind #5 Jefferson Ave., the home of [the defenant] and his mother." The affidavit, the significant portions of which appear in the margin,[2/] sets forth the conversation

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2/ "I was in attendance at room #32 of the Snug Harbor Motel in West Yarmouth on Sept. 11, 1980, at approximately 12:00 P.M. I was assisting Ptlm. Raymond Scichilone of the Yarmouth Police Department in his execution of a search warrant. The room had been registered to a Christine Higgins and the reservation had been made by a Richard Kelleher. While executing this search warrant, several items of identification, including credit cards,

(footnote continued)

further. The informant described the

(footnote continued)

in the names of Dr. Austin O'Malley and J. Pendergast were located in a wallet that had been in a maroon purse which was situated on the mirrored dresser in the rear of the motel unit. These items were seized and turned over to Det. James Tamash of the Barnstable Police Dept. Det. Tamash also had copies of the theft reports that had been reported to the Barnstable Police Dept. by Dr. O'Malley and J. Pendergast, on Sept. 4, 1980 and Sept. 10, 1980, respectively. These lists include a large quantity of gold and silver jewelry."

"On Sept. 11, 1980, at approx. 3:20 P.M., this officer received a call from an unidentified female stating that there is a motor home full of stolen stuff parked behind #5 Jefferson Ave., the home of George Upton and his mother, name unknown. This unidentified female also told me that the stolen items consisted of jewelry, gold, silver, Television sets and a quantity of narcotics. She further stated that George Upton was going to move the motor home any time now because of the fact that Ricky Kelleher's motel room was raided and that George had purchased these stolen items from Ricky Kelleher. This unidentified female stated that she had seen the stolen items but refused to identify herself because "he'll kill me", referring to George Upton. I then

(footnote continued)

stolen items generally and said that

(footnote continued)

told this unidentified female that I knew who she was, giving her the name of Lynn Alberico, who I had met on May 16, 1980, at George Upton's repair shop off Summer St., in Yarmouthport. She was identified to me by George Upton as being his girlfriend, Lynn Alberico. The unidentified female admitted that she was the girl that I had named, stating that she was surprised that I knew who she was. She then told me that she'd broken up with George Upton and wanted to burn him. She also told me that she wouldn't give me her address or phone number but that she would contact me in the future, if need be."

"On Sept. 11, 1980, I drove to #5 Jefferson Ave., West Yarmouth, and observed a white, Dodge Tioga Motor Home parked on the premises, immediately to the left of the dwelling, encircled by a 6' high stockade fence. I therefore am requesting a search warrant to search the entire premises, including any vehicles parked thereon, and curtilage, as I feel I have probable cause to believe that any/all of the items listed on attached sheets marked "B" "C" "D", are to be found on and within the described premises."

the defendant was going to move the motor home because Kelleher's motel room had been raided. She said the defendant had purchased the stolen items from Kelleher. She said she had seen the items, although she did not state when and where she had seen them. In further conversation, she agreed to Beland's suggestion that she was Lynn Alberico, a former girlfriend of the defendant. Later that day Beland went to 5 Jefferson Avenue and saw a motor home parked on the premises. He then prepared the application for a search warrant, obtained the warrant while other officers watched the premises, and, with four other officers, executed the warrant on the evening of the same day. Numerous items were seized in the course of searching the motor home.

The defendant filed two motions to suppress the evidence seized at the motor home. A Superior Court judge heard and denied the first motion, filed with respect to charges set forth in an initial group of indictments. When further indictments were returned involving additional charges against the defendant, he filed another motion to suppress. A second Superior Court judge heard that motion and denied it. The judges' findings concerning the issuance of the warrant to search the motor home were substantially the same.3/

3/ The second judge expressed serious misgivings whether he should have heard evidence on the second motion. The issues available for argument on the second motion were available for argument on the first. The available evidence was the same; the same application for a search warrant was

(footnote continued)

At the trial before a third Superior Court judge, Kelleher testified to his participation in breaking and entering certain homes with one Jimmy Ellis. He testified that the defendant served as a lookout and that the defendant paid him for the stolen objects which were taken to the motor home. The defendant sought unsuccessfully to obtain immunity from the trial judge for Jimmy Ellis. The

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(footnote continued)

involved in each motion. If the available issues and relevant facts are the same on two successive motions seeking substantially identical relief, we see no reason to require a full hearing on the second motion, unless the applicable law has changed since the first hearing. See, Commonwealth v. Richmond, 379 Mass. 557, 558 (1980). In his discretion a second judge, of course, could hold a second hearing or, where substantial justice requires, permit the first motion to be renewed. See Mass. R. Civ. P. 13(a)(5), 378 Mass. 871 (1979).

defendant asserted that Ellis would testify that the defendant had nothing to do with the house breaks at the Pendergast residences and that Kelleher had disposed of the stolen property after dropping Ellis off at his house. We turn first to the defendant's challenge to the search warrant.

1. This case was argued before us in January, 1983, in terms of the application to this case of principles expressed Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), concerning search warrants issued on the basis of disclosures by unnamed informants. On June 8, 1983, the Supreme Court of the United States decided Illinois v. Gates, 103 S.Ct. 2317 (1983). The opinion of the Court in the Gates case, joined in by five Justices, states that the

existence of probable cause to issue a search warrant should be determined by considering the "totality of the circumstances" shown in the affidavit in support of the issuance of the warrant. Id. at 2332. In so stating the standard to be applied where an affidavit relied on an informant's tip, the Court repudiated overly technical interpretations of the "two-pronged test" generally understood to be applicable under that Court's opinions in the Aguilar and Spinelli cases. The"two-pronged test" required that the magistrate be informed of (1) some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that

the informant was "credible" or his information "reliable" (the veracity test). Aguilar v. Texas, supra at 114. If the informant's tip does not satisfy each aspect of the Aguilar test, other allegations in the affidavit that corroborate the information could support a finding of probable cause. Spinelli v. United States, supra at 415.

In the Gates opinion, the Court noted that "veracity" and "basis of knowledge" are highly relevant in determining the value of an informant's disclosures, but it rejected the idea that these were "separate and independent requirements to be rigidly exacted in every case." Illinois v. Gates, supra, at 2327-2328. "[A] deficiency in one [prong] may be compensated for, in determining the overall reliability of a tip, by a

strong showing as to the other, or by some other indicia of reliability." Id. at 2329. As the Court viewed the matter, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for ... conclud[ing]' that probable cause existed. Jones v. United States [362 U.S. 257, 271 (1960)] ... We are convinced that this flexible, easily applied standard will better achieve the

accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from Aguilar and Spinelli." Illinois v. Gates, supra at 2332. In view of this new standard, said to be "flexible" and "easily applied," like some commercial product, this court issued an order on June 30, 1983, asking for supplemental briefs and further oral argument in light of the Gates opinion.4/

4/ Our order read in part: "In light of the Gates opinion, the Court requests that the parties agree on a schedule for the prompt briefing, and subsequent oral argument before the Justices, of these issues: (1) the effect of the Gates opinion on this case and (2) what, if any State law, including constitutional requirements, should be applied in determining the admissibility of the evidence seized pursuant to the search warrant."

(footnote continued)

It is not clear that the Gates opinion has announced a significant change in the appropriate Fourth Amendment treatment of applications for search warrants. Looking at what the Court did on the facts before it, and rejecting an expansive view of certain

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(footnote continued)

In our order we invited briefs from amici curiae. We appreciate the help provided to us by each brief filed as amicus curiae. A brief on behalf of the Attorney General and most of the Commonwealth's district attorneys argues that the Gates standard of "totality of the circumstances" is consistent with the requirements of art. 14 of the Declaration of Rights of the Constitution of the Commonwealth. A second brief, filed by Mr. Stephen R. Kaplan, who had served as an assistant district attorney for the Northwestern District for ten years, argues that, if the Gates opinion has depressed the Fourth Amendment standard of probable cause, this court must use art. 14 to assure the application of proper standards.

general statements not essential to the decision, we conclude that the Gates opinion deals principally with what corroboration of an informant's tip, not adequate by itself, will be sufficient to meet probable cause standards. The Court granted that the affidavit in the Gates case "might well not permit a sufficiently clear inference regarding the [anonymous informant's] 'basis of knowledge'" (Illinois v. Gates, supra at 2326), but concluded that corroboration of details in the tip, including prediction of the defendants' future conduct, was sufficient to warrant a finding of probable cause. In this respect, the Court's treatment of the information disclosed was similar to the treatment of the informant's information in Draper v. United States, 358 U.S. 307 (1959), where the accurate prediction of

the defendant's future, seemingly innocent conduct provided a substantial basis for crediting the informant's hearsay information.[5/]

We do not view the Gates opinion as decreeing a standardless "totality of the circumstances" test. The informant's veracity and the basis of his knowledge are still important but, where the tip is adequately corroborated, they are not elements indispensible to a finding of probable cause. It seems that, in a given case, the corroboration may be so strong as to satisfy probable cause in the absence of

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5/ In neither the Gates nor the Draper case was the basis of the informant's knowledge of criminal conduct shown. The Draper case involved a known, reliable informant and a warrantless search.

any other showing of the informant's "veracity" and any direct statement of the "basis of [his] knowledge." We shall analyze the affidavit in support of the application for a warrant to search the defendant's premises in light of our view of the Gates opinion, mindful that we should not have a "grudging or negative attitude ... towards warrants" (United States v. Ventresca, 380 U.S. 102, 108 [1965]), that we should pay great deference to the magistrate's determination of probable cause (Spinelli v. United States, 393 U.S. 410, 419 [1969]), and that a "practical, common-sense judgment [is] called for in making a probable cause determination" (Illinois v. Gates, supra at 2335).

Prior to the Gates opinion, we might have been inclined to go directly to the

veracity test and to pass by the question whether the informant's statements adequately show underlying circumstances from which she concluded that the evidence being sought was in the motor home. But the Gates opinion teaches us that a strong showing as to one element of an informant's tip may compensate for a deficiency as to the other. Illinois v. Gates, supra at 2329. Thus we discuss the affidavit as to the informant's "basis of knowledge."

The basis of the informant's knowledge that stolen property was in the defendant's motor home is not forcefully apparent in the affidavit. She said that there was stolen property in the motor home and described it generically. Although she said that she had seen the stolen property, she did not say that she had seen it in the

motor home or where or when she had seen it. From her statement that the defendant was planning to move the motor home because Kelleher's motel room had been raided, one may reasonably infer that she believed the stolen property was then in the motor home. But we do not know why she believed the property was there - from hunch, from personal observation, or from information from some undisclosed third party. The "basis of knowledge" element might qualify for a passing mark from a benevolent grader, but the strength of this element is not sufficient to bolster deficiencies in the affidavit in other relevant aspects.[6/]

6/ We see no significant support for basing a "basis of knowledge" test on the informant's unconfirmed statement that she had been the defendant's girlfriend and Lieutenant Beland's unconfirmed guess as to who she was.

We turn then to the veracity element, the question whether the information given was likely to be accurate. None of the common bases for determining the credibility of an informant or the reliability of her information is present here. The affidavit does not assert that the informant should be believed on the basis of her past performance as a credible informant. See McCray v. Illinois, 386 U.S. 300, 303-304 (1967); Commonwealth v. Vynorius, 369 Mass. 17, 21 (1975). Nor does the affidavit show that the information was credible or her information reliable because she made a statement against her penal interest, such as admitting participation in a crime. See, United States v. Harris, 403 U.S. 573, 583 (1971) (plurality opinion); Commonwealth v. Vynorius,

supra. Cf. Commonwealth v. Alessio, 377 Mass. 76, 82 (1979) (no substantial weight given to incriminating statements of an anonymous informer). Nor was the informant "an ordinary citizen" who provided information as a witness to a crime. See Commonwealth v. Bowden, 379 Mass. 472, 477 (1980).

The informant's tip disclosed no other basis for reasonably concluding that she was credible or her information reliable. She was an anonymous informant, and her unverified assent to the suggestion that she was Lynn Alberico does not take her out of that category.7/ Her concern, first

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7/ In its original brief and again during the course of oral argument, the Commonwealth acknowledged that the

(footnote continued)

expressed, that the defendant would kill her if he knew of her telephone call, casts doubt on the veracity of her admission as to who she was. A statement by a known informant who gave information placing herself in personal danger would have had far greater inherent reliability. Lieutenant Beland did not state that he recognized the voice. She declined to give her address or telephone number. Her adoption of the suggestion that she was Alberico could easily have been a convenient cover for her true identity.

(footnote continued)

informant was an unknown person. The magistrate could not have reasonably concluded otherwise. If Lieutenant Beland had known who the caller was, he would have said so in his affidavit and would not have referred to the caller as "an unidentified female."

Our inquiry does not cease, however, when the credibility of an informant or the reliability of her information is not shown by her past actions or by her statement itself. An informant's tip may be corroborated, and thus made trustworthy, by other information presented in the affidavit. See Illinois v. Gates, supra at 2329; Spinelli v. United States, 393 U.S. 410, 415-418 (1969); Commonwealth v. Kaufman, 381 Mass. 301, 303 (1980); Commonwealth v. Genest, 371 Mass. 834, 837-838 (1977). The corroboration must be "weighty enough to establish reflexively" that the informant was trustworthy or that the assertions of criminal activity were well buttressed. Commonwealth v. Kaufman, supra. See Draper v. United States, 358 U.S. 307,

312-313 (1959) (warrantless arrest and search). Thus the corroboration of major parts of the informant's information in the Gates case warranted the magistrate's probable cause determination by providing a substantial basis for crediting the hearsay. See Illinois v. Gates, supra at 2334-2335. Corroboration of innocent details will normally be less significant in establishing probable cause than corroboration of facts suggestive of criminal conduct. See Ker v. California, 374 U.S. 23, 36 (1963); Commonwealth v. Kaufman, supra at 303 n.2; Commonwealth v. Alessio, 377 Mass. 76, 81 (1979); Commonwealth v. Stevens, 362 Mass. 24, 28 (1972); 1 W. LaFave, Search and Seizure §3.3, at 557-558 (1978). However, "the degree of

suspicion that attaches to particular types of noncriminal acts" is said to be more significant than whether the particular conduct was "innocent" or "guilty." Illinois v. Gates, supra at 2335 n.13. A tip, intrinsically insufficient and insufficiently corroborated, may nevertheless be considered in the total picture and may contribute toward satisfying a magistrate as to probable cause. Commonwealth v. Kaufman, supra at 303. See Spinelli v. United States, supra at 418; Commonwealth v. Boswell, 374 Mass. 263, 268 (1978).

The affidavit did contain some corroboration of the informant's information. She was correct in stating that Kelleher's motel room had been "raided." This information was timely.

It may reasonably be inferred that certain property stolen in recent housebreaks had not been recovered in Kelleher's motel room. Lieutenant Beland confirmed that an apparently movable motor home was parked at 5 Jefferson Avenue, the defendant's premises. The informant also seemed to know that Lynn Alberico had been a girl friend of the defendant, a fact Beland could confirm from his own knowledge. No other fact stated by the informant was corroborated. The affidavit contained no independent information in support of the issuance of the search warrant, such as a police investigation showing that stolen property was probably in the motor home or that there was a link between the Kelleher motel

room and the defendant.[8/]

We conclude that the limited police corroboration of the informant's statements set forth in the affidavit and the informant's statements themselves did not warrant a finding of probable cause. The fact that the defendant had had a girl friend named Alberico added almost nothing to bolster the trustworthiness of the informant's statements. The presence of the motor

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8/ The affidavit would have been measurably aided if it had stated, as was the fact, that a wallet containing identification of Upton's wife had been found in the motel room. It would have been somewhat strengthened by a reference, as was the fact, to knowledge of Upton's prior conviction for receiving stolen property, and possibly by a reference to his reputation as a "fence" dealing in stolen property. See Commonwealth v. Kaufman, supra at 304 n.4; 1 W. LaFave, Search and Seizure §3.2, at 470-475 (1978).

home at #5 Jefferson Avenue was confirmed, but that fact related to innocent, nonsuspicious conduct. The mere confirmation, as would be true in every case, that a place to be searched in fact exists does little to credit other facts an informant discloses. Finally, the reliability of the informant's tip cannot be inferred solely from the fact that she knew that the police had raided a third person's motel room. Our cases upholding the reliability of an anonymous informant's tip have involved more substantial corroboration than that shown in this case. See Commonwealth v. Alessio, 377 Mass. 76, 80-82 (1979); Commonwealth v. Genest, 371 Mass. 834, 837-838 (1980); Commonwealth v. Avery, 365 Mass. 59, 62-64 (1974) (warrantless arrest); Commonwealth v. Anderson, 362 Mass. 74,

76-77 (1972). The facts corroborated in the Gates case are far more extensive and significant than the facts corroborated in this case. The tip in the Gates case involving the defendant's suspicious conduct, specifically detailed, was "corroborated in major part" by police investigation. See Illinois v. Gates, supra at 2335. No arguably suspicious conduct of the defendant in this case was corroborated. Indeed, the informant gave little specific detail at all.

If the affidavit in the case before us were to be upheld, the Fourth Amendment would be weakened to the level of permitting the search of any person's premises based on a telephone tip from an anonymous informer who told a story connecting those premises with the fact of a recent police search of a third

person's room on premises to which the public had access. Until advised to the contrary, we believe the Gates opinion should not be read as permitting such a radical result. The motions to suppress should have been allowed.9/

Because we conclude that the evidence seized pursuant to the search warrant should have been suppressed by application of Fourth Amendment principles expressed by the Supreme Court of the United States, particularly and most recently in Illinois v. Gates, we need not consider whether the search

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9/ The Commonwealth has not argued that the exclusionary rule should not apply here because the police acted reasonably and in good faith pursuant to a warrant issued by a magistrate, an issue the Supreme Court declined to consider in the Gates case. Illinois v. Gates, supra at 2321-2325.

violated the cognate provisions of art. 14 of the Massachusetts Declaration of Rights or, if it did, in what circumstances, if any, we would conclude that that evidence must be excluded as a matter of State law.

Clear lines defining constitutionally permissible conduct are most desirable to guide the police, magistrates, prosecutors, defense counsel, and judges. If we have correctly construed the significance of Illinois v. Gates, the Fourth Amendment standards for determining probable cause to issue a search warrant have not been made so much less clear and so relaxed as to compel us to try our hand at a definition of standards under art. 14. If we have misassessed the consequences of the Gates opinion and in fact the Gates standard proves to be unacceptably

shapeless and permissive, this court may have to define the protections guaranteed to the people against unreasonable searches and seizures by art. 14, and the consequences of the violation of those protections.10/

2. The Commonwealth argues that, if the search warrant was defective, the search was based on probable cause and could properly have been conducted without a search warrant because there were exigent circumstances justifying prompt action. Even if a warrant is

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10/ Our invitation for further briefs following the release of the Gates opinion (see note 4 above) raised the possibility of the applicability of State law other than constitutional requirements. We need not decide here whether the warrant requirements of G.L. c. 276 §2B, impose a stricter standard for the issuance of a search warrant than the Fourth Amendment or art. 14.

invalid, a search might be justified as a warrantless search. See Commonwealth v. White, 374 Mass. 132, 140 (1977), aff'd by an equally divided Court, 439 U.S. 280 (1978).

There is a possibility that there was probable cause to search based on additional information not set forth in the affidavit in support of the search warrant. The police officer at the site noticed the defendant and his brother removing items from the motor home and taking them to the house. He also saw thick smoke coming out of a chimney although it was not a cold day. See note 8 above for additional information bearing on probable cause not disclosed in the affidavit. Even if there was probable cause to search, the search was a general search, purportedly pursuant to the warrant, producing items not in

plain view. It is questionable whether such a general search could be justified as a warrantless search. See Commonwealth v. Young, 382 Mass. 448, 460-461 (1981). Moreover, it is doubtful that there were exigent circumstances requiring immediate action. The standards as to exigency are strict, and the Commonwealth had the burden of proof. See Commonwealth v. Huffman, 385 Mass. 122, 124-125 (1982). From their testimony, the police who were on the scene while the warrant was being sought appear not to have reacted to the smoke as if it created an emergency. They waited for the search warrant. The Commonwealth did not advance the argument that there were exigent circumstances in either of its memoranda filed with the motion judges. Because this contention was not

presented to the motion judges, the argument comes too late. See Commonwealth v. Scala, 380 Mass. 500, 510 (1980). The necessary factual determinations concerning exigency were not made and should have been sought when the motions were considered. Nor, as far as appears, was the defendant given warning that the Commonwealth was relying on exigent circumstances to justify the search. If the defendant had had notice of this contention, he might have offered evidence tending to show that there was no emergency.

3. Although the motions to suppress the evidence seized at the defendant's home should have been allowed and, therefore, that evidence will not be admissible at any retrial of the defendant, there was other evidence to support the defendant's conviction on at

least some of the charges against him. Therefore, we consider an issue that may arise if the defendant is to be tried again.

The defendant challenged the denial of a judicial grant of use immunity to one James Ellis who, it was argued, would contradict the testimony of Richard Kelleher incriminating the defendant. Kelleher was an important Commonwealth witness. He testified that the defendant drove Ellis and him to certain houses which they broke into at the defendant's direction, while the defendant served as a lookout. Kelleher also testified that he had sold stolen property to the defendant. Kelleher's testimony tended to show that he and the defendant had been engaged during the summer and fall of 1980 in numerous housebreaks.

In the course of the trial, and after the Commonwealth had rested, the defendant moved that the judge grant use immunity to Ellis. The judge held a voir dire on that motion. He heard testimony from Ellis, who was represented by counsel. Ellis described the circumstances that led him to appear at the trial at the defendant's request. He said that he wanted to give his version of what happened concerning certain housebreaks and stolen property. However, he declined to testify about particular events, relying on his right against self-incrimination under the Fifth Amendment. He did not refer to his right, stated in art. 12 of the Massachusetts Declaration of Rights, not to be compelled to furnish evidence against himself. He testified that he had talked to an investigator for the defendant before the trial began and

told him "what [his] position was in the case."

Defense counsel made an offer of proof concerning Ellis's anticipated testimony. He would have testified that he engaged in certain housebreaks with Kelleher, that Kelleher did not want him to know with whom he was dealing in disposing of the stolen property, and that the defendant did not drive them to the houses they broke into. Ellis would also have testified that he had no contact with the defendant prior to or after the housebreaks. The judge denied the motion in the exercise of his discretion.[11/]

11/ The judge's denial of the motion could be justified on the ground that it came too late as to a potential witness known to the defense's investigator before trial to whom Ellis had stated "[his] position" as to the case. That ground for denial of such a motion presumably will not be available in connection with any retrial.

We recently rejected the claim of defendants that they had a constitutional right to have a prospective defense witness immunized. Commonwealth v. Curtis, 388 Mass. 637, 643-645 (1983). We recognized that the Federal courts have generally rejected such claims under the Constitution of the United States. Id. at 644-645. See United States v. Thevis, 665 F.2d 616, 639 (5th Cir.), cert. denied, 103 S.Ct. 57 (1982). See also United States v. Bounos, 693 F.2d 38, 39 (7th Cir. 1982) ("no such animal as judicial immunity" exists); United States v. Hunter, 672 F.2d 815, 818 (10th Cir. 1982) (courts have no power independently to fashion witness use immunity under the guise of due process). The Court of Appeals for the First Circuit has left open the question when, if ever, due process may

require immunization of defense witnesses. United States v. Flaherty, 668 F.2d 566, 582-583 & n.6 (1st Cir. 1981). The Court of Appeals for the Second Circuit would foreclose all inquiry into the question of immunity if the prospective witness is an actual or potential target of prosecution. See United States v. Turkish, 623 F.2d 769, 778 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). This was essentially the view we expressed in the Curtis case, barring "some unique circumstances." Commonwealth v. Curtis, supra at 645-646.

In passing on a request for immunity, if the prospective witness relies on his right not to incriminate himself expressed in art. 12 of the Declaration of Rights, consideration might have to be given to the

requirement under the Constitution of the Commonwealth that a grant of immunity must be a grant of transactional, and not merely use, immunity. Attorney Gen. v. Colleton, 387 Mass. 790, 795-797 (1982). Emery's case, 107 Mass. 172, 185 (1871). The situation is different under the Fifth Amendment to the Constitution of the United States, where a grant of immunity to a witness is constitutionally adequate if it proscribes the use in a subsequent criminal case against the witness of the compelled testimony and any evidence directly or indirectly derived from that compelled testimony. Kastigar v. United States, 406 U.S. 441, 453 (1972). This difference may be significant in weighing the government's legitimate interests in whether immunity should be granted.

On the record in this case, a judicial grant of use immunity to Ellis was not required under constitutional principles. We decline to speculate on what arguments on the immunity question the defendant may present if the defendant is to be retried. We would expect that any claim for immunization of Ellis would be advanced and heard sufficiently before trial so that a timely decision could be made.

4. The judgments are reversed and the verdicts set aside. The orders denying the defendant's motions to suppress evidence seized at his residence are also vacated. Orders shall be entered allowing those motions to suppress. The case is remanded to the Superior Court.

So ordered.

LYNCH, J., (dissenting, with whom Nolan, J., joins). In its opinion, the majority reduces the United States Supreme Court's recent decision in Illinois v. Gates, 103 S.Ct. 2317 (1983), to a mere elaboration upon the "two-pronged test" of Aguilar v. Texas, 378 U.S.108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), despite the clearly articulated judgment of the Court "that it is wiser to abandon the [Aguilar/Spinelli test]". Illinois v. Gates, supra at 2332. I dissent from that portion of the opinion. As the majority views it, "the Gates opinion deals principally with what corroboration of an informant's tip, not adequate by itself will be sufficient to meet probable cause standards." Supra 568. Significantly, the majority persists in making the

initial decision as to the adequacy of a tip according to the specific legal tests of Aguilar and Spinelli, which stipulate that an affidavit must present: "(1) some of the underlying circumstances from which the informant concluded that the contraband was where he claimed it was (the basis of knowledge test), and (2) some of the underlying circumstances from which the affiant concluded that the informant was 'credible' or his information 'reliable' (the veracity test)." Supra at 569-570. The majority seeks to address recurrent criticisms of this test, that such a precise set of legal rules is as ill-suited to the police officer in the field as it is to the magistrate trying to assess a complicated fact situation, by the corrective gloss of corroboration: if either "prong" of the

test is dealt with inadequately in the affidavit, independent corroboration may be used to fill in the gaps. Hence a technical exception is carved out of the technical legal standards of Aguilar and Spinelli.

I believe that Illinois v. Gates, supra, properly read, means more than this. At its foundation, the majority opinion in Gates derives from the observation that "probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules." Id. at 2328. This recognition of the difficulty of fashioning uniform legal criteria applicable to diverse factual situations in the search-and-seizure context is reflected in the adoption by the United

States Supreme Court of a "totality of the circumstances" standard, "which permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip (emphasis added)." Id. at 2330.

The most important aspect of this new standard is a shift in emphasis from the reviewing court to the magistrate. If the latter has a "substantial basis" for finding the existence of probable cause to search, this is enough: "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review." Illinois v. Gates, supra at 2331. I submit that this new orientation toward the "practical, common-sense decision" of a magistrate represents a significant change from the previous emphasis placed

on compliance with the rules set forth in Aguilar and Spinelli. Id. at 2332. The change is for the better; the determination of probable cause, whether by a police officer or a magistrate, should be governed by "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Illinois v. Gates, supra at 2328, citing Brinegar v. United States, 338 U.S. 160, 175 (1949).

In the instant case, faithful application of the "totality of the circumstances" standard announced by Gates, rather than a "two-pronged test" adjusted by a corroboration feature, would have upheld the magistrate's finding of probable cause to issue a warrant. An unannounced search of the motel room of one Kelleher yields

property stolen in recent local robberies. Three hours later, a telephone call is received. The caller, whose identity is admittedly unknown, reveals knowledge of the motel search, links the defendant to the search by saying that more stolen items (which are identified and correspond to objects taken in the robberies) which the defendant bought from Kelleher are located in the defendant's mobile home, and communicates the exigency of these circumstances by informing the police that the defendant knows of the motel room search and is planning to move the stolen items. Whether or not the caller actually is Lynn Alberico, the caller is close enough to the defendant to know his girlfriend's name and his address, and to have been inside the defendant's mobile home and to have actually seen

the "stolen stuff." The informant appears credible. The location of the mobile home is verified, and explanation is provided for the abrupt and incomplete nature of the information provided (the caller fears retaliation), this explanation also supplies a motive (revenge), and, most importantly, the timing of the call is too close to the search of the motel room to be a mere fortuity. All of this information was provided in the affidavit.

I agree with the majority that if the affidavit had included additional facts that were known to the police, it "would have been measurably aided." Supra at n.8. However, I believe that the "totality of the circumstances" standard announced by Gates was tailor-made for circumstances such as these. Judging the affidavit solely on

its face, "there [was] a fair probability that contraband or evidence of a crime [would] be found" in the mobile home. See Illinois v. Gates, supra at 2332.

I see no conflict between this interpretation of the mandate of Gates, which simply involves taking the decision at face value, and either art. 14 of the Massachusetts Declaration of Rights or G.L. c. 276, §2B. The language of the Fourth Amendment to the United States Constitution has been commonly thought of as paralleling that of art. 14, and indeed the structure of the latter has been viewed as occupying an important role in the drafting of the Fourth Amendment. Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting). See Commonwealth v. Cundriff, 382 Mass. 137,

144 n.11 (1980) cert. denied, 451 U.S. 973 (1981); Commonwealth v. Wilkins, 243 Mass. 356, 360 (1923). There appears to be no logical basis, and no support in the case law, for interpreting the term "cause" in art. 14 differently from the "probable cause" requirement of the Fourth Amendment.[1/] I also find no

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1/ It is true that on various occasions we have acknowledged that art. 14 could conceivably be applied to searches more strictly than the Fourth Amendment; however, this hypothetical situation has not yet arisen. Commonwealth v. Ortiz, 376 Mass. 349, 358 (1978). Commonwealth v. Nine Hundred and Ninety-Two Dollars, Mass. Adv. Sh. (1981) 1420, 1427. Commonwealth v. Sheppard, 387 Mass. 488, 508 & n.22 (1982), cert. granted, 103 S.Ct. 3534 (1983). Cf. Selectmen of Framingham v. Municipal Court of the City of Boston, 373 Mass. 783, 786-788 (1977) (violation found of both State and Federal Constitution). Although other provisions of the Massachusetts Constitution have been interpreted to afford greater protection than the

(footnote continued)

support for the defendant's argument that the "two-pronged" test of Aguilar and Spinelli is "engrafted" into art. 14.

I similarly find no merit in the defendant's contention that G.L. c. 276, §2B, as amended by St. 1965, c. 384, should be read to require application of the "two-pronged test." The operative language of §2B instead implies just the opposite, namely that determination of the sufficiency of an affidavit should

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(footnote continued)

United States Constitution in a limited number of areas, each area has been characterized by a significant divergence between the language and construction of the respective Federal and State provisions. Commonwealth v. Soares, 377 Mass. 461, cert. denied, 444 U.S. 881 (1979) (jury selection). District Attorney for the Suffolk Dist. v. Watson, 381 Mass. 648 (1980) (death penalty). Moe v. Secretary of Admin. & Fin., 382 Mass. 629 (1981) (abortion).

be based on a totality of the circumstances analysis: "[An] affidavit shall contain the facts, information, and circumstances upon which [the person seeking a search warrant] relies to establish sufficient grounds for the issuance of the warrant." The recommended form of an affidavit, which is delineated in the statute, contains a listing of the elements to be contained in the document, and the list does include information relating to the basis of knowledge and reliability of the information source. The inclusion of these factors in the probable cause determination is again consistent with the Gates decision, which emphasized that while establishing these two "prongs" might not be telling in every case, their existence certainly "illuminates[s] the commonsense,

practical question" of probable cause facing a magistrate. Illinois v. Gates, supra at 2328. The language of G.L. c. 276, §2B, in no way suggests, however, that establishing both "prongs" of Aguilar and Spinelli is a necessary precondition for the adequacy of an affidavit. The defendant's assertion that the statute reflects the approach of Aguilar and Spinelli appears even less likely when one considers that §2B was signed into law on June 16, 1964, St. 1964, c. 557, and Aguilar v. Texas, supra, was decided on June 15, 1964, one day earlier. Spinelli v. United States, supra, in turn, was decided five years later.

Guided by the "totality of the circumstances" analysis adopted by the United States Supreme Court's decision in Illinois v. Gates, 103 S.Ct. 2317

(1983), I would hold that the magistrate had a substantial basis for concluding that probable cause existed for the search of the defendant's mobile home.

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS. SUPERIOR COURT
NO. 40616-19

COMMONWEALTH OF MASSACHUSETTS)
)
VS)
)
GEORGE UPTON)

MEMORANDUM ON DECISION
OF MOTION TO SUPPRESS

The aforesaid matter came before the court upon a hearing upon the defendant's Motion to Suppress physical evidence seized pursuant to a warrant issued on September 11, 1980. The defendant asserts lack of probable cause for the issuance of the warrant, the falsity of the warrant and the over-breadth of said warrant.

The defendant's Motion to Suppress the evidence seized is DENIED based upon the following facts and conclusions of law.

I find that the Yarmouth Police Department, pursuant to a warrant, searched the motel room of an individual named Richard Kelliher and in that search discovered certain credit cards and identification in the names of Dr. Austin O'Malley and J. Pendergast. The aforesaid individuals had reported thefts in their respective homes within 10 days prior to said search. The reported thefts were made to the Barnstable Police Department and included large quantities of gold, silver and jewelry items.

Within a few hours of the above search, Lt. David Beland of the Yarmouth Police Department received a call from an unidentified female who stated that she had seen stolen items of gold, silver, jewelry and other articles in a motor home on the premises occupied by

George Upton and his mother. The caller stated further that George Upton was in the process of moving these stolen items because Rickie Kelliher's motel room had been raided.

The caller gave the address of the motor home as number Five Jefferson Avenue, West Yarmouth, Massachusetts. Officer Beland drove by the location shortly after the telephone call and observed a motor home parked on the premises.

In the company of Officer Fitzgerald, Lt. Beland requested permission of Mr. Upton to search the motor home. Mr. Upton's attorney was present and the request was denied. Lt. Beland left to seek the warrant and Officer Fitzgerald was left to observe the scene. It is stipulated that Officer Fitzgerald would testify that he

saw George Upton and his brother removing articles from the motor home and placing said articles into the residential home at Five Jefferson Avenue. After this activity, Officer Fitzgerald observed dark smoke from the chimney area of said house.

Lt. Beland secured the warrant upon his affidavit relative to the search of the room of Richard Kelliher and the identification of the theft victims together with the information supplied by the caller relative to the location of stolen property. George Upton was known to the police as a receiver of stolen goods and had prior convictions for similar offenses.

Armed with the search warrant, police from Yarmouth and Barnstable searched the home and the motor home located at Five Jefferson Avenue. The

warrant referred to gold, silver and jewelry with lists of items taken in the O'Malley and Pendergast thefts appended to the affidavit on the warrant.

Officers present at the search had been involved in the investigations of not only the above listed thefts but other thefts of property of the same type listed in the warrant that had taken place in recent months in the Yarmouth and Barnstable area.

The officers seized 78 watches found in a plastic bag as some of the watches were still running. The defendant stated to the police that he had these items because his uncle saved watches. Coin proof sets were removed by the police as items that had been listed among those stolen in recent robberies. A gentleman by the name of Lindsey was present while the search was being

conducted and claimed that the proof sets belonged to him and had been bought at auction in Florida. Mr. Lindsey further volunteered that other items were his as he had a license to operate flea markets in the State of Florida.

Mr. Lindsey was unable to produce any form of title of specific indicia of ownership to buttress his bare assertion of claim.

The police observed a number of empty jewelry boxes and seized one of the boxes that was full of silver jewelry only on the basis of Mr. Upton's reputation, the fact that the jewelry box contained items of initialled pieces not consistent with Mr. Upton's initials and the fact of all the jewelry being of the same type. Silver serving pieces, gold goblets and silver goblets were seized as the same were in places in the

motor home and in a condition that was inconsistent with ownership being in Mr. Upton.

The motor home was not owned by the defendant and he told the police that he had been living in it for about a month. In addition to items seized that fell within the renge of the warrant, the police observed firecrackers, a telephone headset labelled "Property of Bell Systems - Not for Sale" and a double-edged knife. All three items were seized on the basis that each item was illegal to possess and constituted contraband. The defendant claimed that the telephone headset had been left there by a repairmen a few days ago. No telephone was seen in the motor home.

The defendant seeks to suppress the evidence on the basis of lack of probable cause for the issuance of the

warrant, misrepresentation in the affidavit for the warrant and over-breadth.

I find that the police had sufficient probable cause due to the following circumstances:

1) The police received an informant's call a few hours after they had searched Kelliher's motel room. The informant referred to that search and to the fact that Upton was about to take action based upon that raid.

2) The informant stated that she had seen stolen items and gave credence to her information by this personal knowledge.

3) The police found evidence of items involving recent thefts in Kelliher's motel room.

4) The police had sufficient probable cause to believe that articles

from the recent thefts were in the possession of George Upton. There is sufficient nexus between the information supplied to the police, the timeliness and the sequence of events for reasonable inferences to be drawn. Officer Beland corroborated the information by observing that a motor home was present at Five Jefferson Avenue.

I find that the affidavit did not contain misrepresentations nor was the information false.

1) The caller refused to identify herself and cited fear of the defendant as her reason.

2) Officer Beland suggested that he knew her identity as the last girl he had known Upton to be seeing. When Beland suggested that the caller was Lynn Alberico, the caller adopted his

suggestion. Beland had no reason to know whether the adoption of the caller of this identity was false or not.

3) All of these facts were spelled out in the affidavit and I find that there was no attempt to deceive the Magistrate. The affidavit is based upon the knowledge of the affiant and I find no defect or falsehood in the same.

4) The fact that Lynn Alberico now denies that she was the caller does not impact upon the integrity of the affidavit.

I find that the warrant is not defective due to over-breadth.

1) The home at Five Jefferson Avenue together with automobiles on the premises was listed on the warrant. The search of the home revealed no items to be seized. All articles were found in the motor home.

2) The caller referred specifically to the motor home. However, the motor home was parked in a position directly abutting the house and the nature of the articles were portable and could easily have been removed from the motor home to the house. The caller had informed the police that it was Upton's intention to remove the stolen property.

3) The inclusion of the house within the search warrant was not an imaginative flight of fancy or calculated harrassment by the police but was based upon articulable facts within the knowledge of the police.

It is further noted that while exigency is not a factor that need to be shown for a search with a warrant, the factor of exigency was present as the police were dealing with stolen items in a motor home. That vehicle has the same

inherent mobility as an automobile. Considering the totality of all of the circumstances, the defendant has not met the burden of persuasion that the warrant was defective and that the items seized should be suppressed.

The articles not included in the general description within the warrant and referred to as contraband within these "Findings" speak for themselves and were properly seized by the police.

By the Court.

Elizabeth J. Dolan
Associate Justice

February 9, 1981

A true copy, Attest:

Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. SUPERIOR COURT
CRIMINAL
NOS. 40921-25

COMMONWEALTH

vs.

GEORGE UPTON

MEMORANDUM OF DECISION
ON
DEFENDANT'S MOTION TO SUPPRESS
(Including Findings of Fact
and
Conclusions of Law)

I. PROCEDURAL BACKGROUND AND HISTORY

On March 10, 1981, the Grand Jurors for Barnstable County returned five separate indictments naming George Upton (Upton) as defendant in each.

#1. Indictment No. 40921

This indictment charges Upton in six counts with breaking and entering certain specified dwelling houses in the daytime with intent to commit larceny. G.L. c. 266, §18.

#2. Indictment No. 40922

This indictment charges Upton in six counts with larceny of various described items of personal property from the several premises specified in Indictment No. 40921. G.L. c. 266, §20.

#3. Indictment No. 40923

This indictment charges Upton with the larceny of firearms owned by a certain named individual. G.L. c. 266, §30.

#4. Indictment No. 40924

This indictment charges Upton in six counts with inciting, procuring, aiding, counseling, hiring or commanding one Richard Kelleher to break and enter, in the daytime, the dwelling houses specified in Nos. 40921 and 40922, with the intent to commit larceny, i.e. being an accessory before the fact of breaking and entering. G.L. c. 274, §2.

¶5. Indictment No. 40925

This indictment charges Upton in six counts with harboring and assisting Kelleher to avoid or escape trial or punishment, i.e. being an accessory after the fact of breaking and entering larceny. G.L. c. 274, §4.

On March 18, 1981, Upton was arraigned and pleaded "not guilty" to each of the five indictments.

On May 18, 1981, Upton filed a motion to suppress (p. 2) applicable to each indictment, in which he seeks "to suppress in these or any other related criminal proceedings any and all property seized on or about September 11, 1980, from property and buildings occupied and/or owned by [him] in West Yarmouth, Massachusetts." The grounds of the motion in general are that "the aforesaid search and seizures violate

[his] right to be free from unreasonable search and seizures, which rights are guaranteed by the Constitution of Massachusetts, Declaration of Rights, Part I, Article XIV, by the Constitution of the United States Article IV, and by G.L. c. 276, §1.

The particularized grounds are that:

a) the application for the search warrant, pursuant to which the premises were searched, fails to set forth probable cause to believe that such items would be found on the premises;

b) there was in fact no probable cause to believe that such items would be found on the premises;

c) search as it was actually executed went beyond the scope of the warrant;

d) the property seized, which is the subject of the prosecution, is not

listed in the search warrant, or the affidavit therefor;

e) there are material misrepresentations of fact in the warrant;

f) the warrant is not signed by the appropriate authority or executed with the appropriate formality;

g) the search and seizures cannot be justified by any rule of law declaring an exception to the rule requiring search warrants.

In his motion to suppress Upton further sought to suppress any and all items, evidence and information which has, or will, come into the possession or knowledge of the Commonwealth as a result, directly or indirectly, of the search and seizure.

The motion was based upon an affidavit of his counsel filed on the

same day and on the application for the search warrant and the search warrant itself, copies of which are attached to the motion and to the affidavit.

Upton also requested an evidentiary hearing.

On July 20, 1981, the court (Travers, J.) allowed Upton's motion (filed July 10, 1981) to continue the date for hearing the motion to suppress and other motions until August 10, 1981. In defense counsel's affidavit in support of the motion to continue it is stated that the trial of Indictments Nos. 40921-25 is scheduled for October, 1981; and also that "[s]everal of the counts in the instant case are related to the counts in the receiving stolen property indictments, Nos. 40616-19. Since the cases are related, the administration of justice and the

interest of this defendant in avoiding repetitive proceedings would appear to dictate a joint trial. For that reason it is anticipated that both cases would go to trial in October."

On August 10, 1981, the motion to suppress came on for hearing before the undersigned justice and was heard. Various witnesses appeared and testified; and certain exhibits were received in evidence. Following the reception of the evidence, counsel argued orally, and thereafter furnished the court with helpful memoranda of law, and (from the Commonwealth) proposed findings of facts.

II. FINDINGS OF FACT and CONCLUSIONS OF LAW

On all of the evidence, some of which was conflicting, and the

reasonable inferences to be drawn therefrom, the court makes the following findings of fact, and rules where indicated:

1. On May 16, 1980, Lieutenant David J. Beland of the Yarmouth Police Department met a person who was introduced to him as Lynn Alberico, at Upton's warehouse or auto body shop in Yarmouth. Upton had her identify herself to him. Beland spoke with her for a few minutes. However, he was not investigating her. He was going to run a records check on her, so he wrote down her name in his notebook, which was a general notebook he carried with him all the time. It contained a number of names of persons not connected with Upton.

2. On August 21, 1980, the home of Dr. Austin O'Malley in Centerville was

broken into and entered. A quantity of personal property was taken, which is listed in a detailed inventory given by the owner to the police. Included on the list are many items of gold and silver jewelry, sterling silver pieces (e.g. candlesticks, cups, trays), rings, a wallet, a camera, gold items (e.g. cuff links, antique pocket watches, lockets, bracelets, etc.). The police report of the O'Malley break and the resulting inventory were in the possession of the searchers of the mobile home here involved.

3. On September 10, 1980, a breaking and entering occurred at the premises of John J. Pendergast in Centerville. The police investigated. They were advised by the owner that two pillow cases, one white with large two-tone blue flowers on it, had been

taken from a bed in the master bedroom and used to carry away many stolen items. The remaining identified floral pillow case was shown to Detective Tamash during the investigation and he noted its distinctive design. A substantial amount of silver and jewelry was taken. A detailed list was later supplied, which included items of gold and sterling silver, currency, rings, engraved watches, spoons and other items of jewelry. The police report and the list of stolen items was in the possession of the police at the time of the challenged search in these cases.

4. On the next day, September 11, 1980, at approximately noon, Beland was in Room #32 of the Snug Harbor Motel in West Yarmouth while a search was being conducted of that motel room. He was there to assist in the search, which was

being conducted pursuant to the authorization contained in a search warrant which named one Richard Kelleher and one Christine Higgins.[1/] The search of those premises revealed items containing the names of Dr. O'Malley and J. Pendergast, being the same persons whose homes recently had been broken into and from which the various items of personal property had been taken. Included among the items found in the motel room were a small, gray strongbox containing pennies; a jeweler's eye glass; a small, gold cross; a Sony AM/FM cassette stereo; and a small amount of marijuana spread throughout the

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1/ Beland's affidavit supporting the application for the search warrant in the instant matter states that the motel room was registered to Higgins, with the reservation having been made by Kelleher.

room. Neither Higgins nor Kelleher was there at the time of the search.

5. Among other effects found by the police in the motel room was a wallet containing identification for Robin Altsheimer, who was Upton's wife.

6. Later on the same day, in mid-afternoon, after the search of the motel room had been completed, Beland received a telephone call at the Yarmouth police station. The call consumed approximately three minutes. An unidentified woman caller stated to Beland that there was a motor home full of "stolen stuff" parked at the home of George Upton and his mother; that the items she was referring to consisted of jewelry, gold, silver, TV sets and narcotics; that Upton was going to move the motor home because he was aware of

the fact that Kelleher's motel room had just been raided.

7. Beland tried to get the caller to identify herself, but she refused, saying Upton would kill her. Beland then pulled out his notebook, found his entry of his meeting with Upton and Lynn Alberico on May 16, 1980, and told the caller that she was Lynn Alberico. The caller thereupon admitted that she was Lynn Alberico and said she was surprised that he knew who she was. Beland did not recognize the caller's voice as that of Alberico. He asked her for her address and phone number but she refused to give him either. She did allow that she would contact him. She also said she had broken up with Upton and that she wanted to "burn" him. The latter statement was made close to the end of the phone conversation. At this time

Beland did not know Upton's marital status, or whether he had more than one girlfriend.

8. The caller also stated during the phone conversation with Beland that she had herself seen the items in the motor home.

9. Beland now went to Upton's home[2/] at 5 Jefferson Avenue and made observations. He next called for assistance at the police station, asking to have copies of the O'Malley and Pendergast breaking-and-entering reports brought to him and for Officers Fitzpatrick and Kilmurray to come to the location.

2/ Apparently the home was shared with Upton's mother and his brothers.

10. Beland next returned to the police station to type up an affidavit to support an application for a search warrant. He had received copies of the O'Malley-Pendergast breaking-and-entering report from one of the detectives, and lists of stolen property.

11. Beland next returned to the police station to type up an affidavit to support an application for a search warrant. He had received copies of the O'Malley-Pendergast breaking-and-entering reports from one of the detectives, and lists of stolen property. He appended the reports and the lists to the affidavit. Then he went to the Centerville home of Assistant Clerk-Magistrate William C. Eldridge, Jr., of the First District Court of Barnstable. Eldridge issued the search warrant, following which

Beland returned with it to 5 Jefferson Avenue.

12. The affidavit in support of the application for the search warrant was signed by Beland. It incorporated, as the information upon which he stated there was probable cause to believe that certain stolen property was being concealed at the described premises, the contents of an attachment "A", signed by Beland, as follows:

> "I was in attendance at room #32 of the Snug Harbor Motel in West Yarmouth on Sept. 11, 1980, at approximately 12:00 PM. I was assisting Ptlm. Raymond Scichilone of the Yarmouth Police Dept. in his execution of a search warrant. The room had been registered to a Christine Higgins and the reservation had been made by a Richard Kelleher. While executing this search warrant, several items of identification, including credit cards, in the names of Dr. Austin O'Malley and J. Pendergast were located in a wallet that had been in

a maroon purse which was situated on the mirrored dresser in the rear of the motel unit. These items were seized and turned over to Det. Tamash of the Barnstable Police Dept. Det. Tamash also had copies of the theft reports that had been reported to the Barnstable Police Dept. by Dr. O'Malley and J. Pendergast, on Sept. 4, 1980 and Sept. 10, 1980, respectively. These lists include a large quantity of gold and silver jewelry. On September 11, 1980, at approx. 3:20 PM, this officer received a call from an unidentified female stating that there is a motor home full of stolen stuff parked behind 5 Jefferson Ave., the home of George Upton and his mother, name unknown. This unidentified female also told me that the stolen items consisted of jewelry, gold, silver, Television sets and a quantity of narcotics. She further stated that George Upton was going to move the motor home any time now because of the fact that Ricky Kelleher's motel room was raided and that George had purchased these stolen items from Ricky Kelleher. This unidentified female stated she had seen the stolen items but refused to identify herself because "he'll kill me", referring to George Upton. I then told this unidentified female that I knew who she was, giving her the name of Lynn Alberico, who I had met on May 16,

> 1980, at George Upton's repair shop off Summer St., in Yarmouthport. She was identified to me by George Upton as being his girlfriend, Lynn Alberico. The unidentified female admitting that she was the girl that I had named, stating that she was surprised that I knew who she was. She then told me that she'd broken up with George Upton and wanted to burn him. She also told me that she wouldn't give me her address or phone number but that she would contact me in the future, if need be. On Sept. 11, 1980 I drove up to #5 Jefferson Ave., West Yarmouth, and observed a white, Dodge Tioga Motor Home parked on the premises, immediately to the left of the dwelling, encircled by a 6' high stockade fence. I therefore am requesting a search warrant to search the entire premises, including any vehicles parked thereon, and curtilage, as I feel I have probable cause to believe that any/all of the items listed on attached sheets marked "B", "C", "D" are to be found on and within the described premises."

Also attached to the Application were four sheets, marked "B", "C", "D" and "E".

13. The Application further averred that the alleged concealed stolen goods

"may be found in the possession of George Upton, James Upton, at premises 5 Jefferson Ave., West Yarmouth, MA." The premises were described in detail, and included "all vehicles and motor homes on the property." The Application specifically requested the issuance of a warrant and order of seizure authorizing the search of "5 Jefferson Avenue, including a white-colored Dodge Tioga Motor Home with a red stripe on the upper, front half of said motor home, and two stripes, one red and one brown, horizontally circling the motor home approximately half way up from the ground, and curtilage for remainder of the property and vehicles..." The property for which the search warrant was sought was said to be on attached sheets marked "B", "C", "D" & "E".

14. The search warrant itself, issued by Assistant Clerk-Magistrate Eldrige on September 11, 1980, stated "that there is probable cause for believing that certain property has been stolen,... - certain rpoperty has been concealed to prevent a crime from being discovered - certain property is unlawfully possessed or kept or concealed for an unlawful purpose"; and commanded "an immediate search of 5 Jefferson Ave., West Yarmouth, MA, described as a wooden frame dwelling... Dwelling has attached garage on right side,..., to include curtilage for entire property and vehicles and motor homes on property; occupied by George Upton, James Upton..." The search was authorized for the following property: "See attached sheets marked 'B', 'C', 'D', and 'E.'" Attached to the search

warrant were various sheets marked "B", "C", "D", with detailed items of personal property.

15. Beland, armed with the search warrant, now returned to the motor home.

16. The motor home had wheels on it. It was parked on the left side of the Upton house, about a foot away. It was enclosed by a stockade fence, two sections of which could be opened up by swinging them apart. The motor home could be moved.

17. Participating in the search of the motor home were Beland, who was in charge; Detective James Tamash of the Barnstable Police Department; Detective Rivers; and Officer Kilmurray (whose participation was limited). While awaiting the start of the search, and while he was on the street, Tamash had heard a radio transmission stating that

items of personal property were being passed from the motor home to the Upton house. On the scene itself he saw objects being passed from the motor home to the house. A little while later he saw smoke coming from the chimney of the house.

18. When Beland arrived at the scene with the search warrant, the search began at the mobile home.

19. When the search began, Beland and the other searching officers were, collectively, in possession of the following information:

(1) The information that Beland and Tamash had received as a result of the search of the Higgins-Kelleher motel room, including the finding of items including credit cards and other identification, directly tied to Pendergast and O'Malley, whose

homes had been entered and from which items had been stolen.

(2) The information which Beland had received from the telephone conversation previously recited.

(3) Beland's knowledge of Upton's past involvement with stolen property, including knowledge that he had a previous conviction and prison sentence for receiving stolen property.

(4) Tamash's knowledge that Upton had been previously convicted of breaking and entering in the night time and larceny.

(5) Beland's knowledge of Upton's general reputation in the community as a "fence" dealing in stolen property.

(6) Beland and Tamash were aware that at that time, the summer of 1980, a minimum of 10-15 house breaks

were being reported each week in the community; that the items reported stolen usually included coins, all types of jewelry, sterling silver flatware and serving pieces, antiques and oriental rugs.

(7) Beland had heard from Fitzpatrick that, while Beland was obtaining the search warrant, Fitzpatrick had observed Upton and his brother James removing items from the motor home, through the window of 5 Jefferson Avenue, and through the door; that Fitzpatrick, although it was a warm day, had seen thick smoke start coming from the chimney of the house. (On entering the house, Beland saw ashes in the fireplace.)

20. After entering the motor home, Beland looked around. He started to pay particular attention to items exposed,

on display or laid out. He looked, among other items, at silver casserole dishes, serving trays, antique items, and many other objects of personal property in plain view within the motor home. The search began, by the searching officers, for items listed in the search warrant and its attachments, in particular gold and silver items of jewelry and personalty.

21. There was no indication that anyone was living in the motor home, or that any female person frequented it.

22. Present in the motor home while the search was being conducted was one Robert Lindsay (a friend of Upton's) who stated to the officers that "a lot of the stuff" was his; that he had a Florida license to deal in antiques and other articles in flea markets. Also present during a part of the search was

Upton's attorney, Charles Dranetz, Esq., who had been called to the scene. Within a month after the search Mr. Dranetz at his office showed Tamash receipts for proof sets of coins which Lindsay had given him showing a purchase of coins in Florida.

23. During the search of the motor home, the following items, among others, were discovered and seized:

Pillow Case - A blue and white pillow case, with a floral pattern, was seen in the mobile home on an overhead bed, along with another pillow case of a different type, and was identified as identical to the pillow case which had been left in the Pendergast house after the break and which had been seen by Detective Tamash during the investigation. Tamash identified the floral pillow case as identical to the

one he had seen which had been left behind. There was probable cause to seize it.

Knife - A double-edged knife was found during the search in a cardboard box on a bunk bed. It was an illegal double-edged knife, and recognized by Tamash as contraband. It was seized. There was probable cause to seize it.

Fireworks - During the search a large bag containing a quantity of fireworks was discovered. It was recognized that it was illegal to possess them and they were seized. There was probable cause to seize them.

Telephone Set - A telephone repairman's handset was seen on the floor. Tamash was familiar with the item, having previously recovered one in another matter. He knew it belonged to

a telephone repairman. Moulded into the handset were the words "Bell System - NOT for Sale - Western Electric." He had probable cause to believe that it had been stolen.

Watches - Over 100 watches were found in the motor home. (Later 74 were counted, as well as one golfer's scorekeeper.) These watches were in a red and white plastic shopping bag on a little table. Only two were running at the time. Some of them had engraving on the back. One was inscribed "To Dudley in memory of Duran 1966." None of the persons with an interest in the motor home was named Dudley or Duran. There was probable cause to seize them.

Coins - In the motor home was a six-foot-long couch with a long cushion. The inside of the couch was hollow. In that space the searchers

found a number of coins. Tamash knew that some of the items taken in the Pendergast break were several mint proof sets[3/] of coins, including 1971 and 1972 Eisenhauer silver dollars, some enclosed in plastic. In the couch were found sets of coins of the same denominations and years as those taken from the Pendergast home. They were seized. There was probable cause to seize them. Other coins for other years and of other denominations were not taken; they had no unique mark or serial number.

3/ Mint proof sets of coins as follows:

4 six coin sets of 1977 coins
4 six coin sets of 1978 coins
4 six coin sets of 1979 coins
4 one coin sets of 1971 Eisenhauer silver dollars
2 one coin sets of 1972 Eisenhauer silver dollars

Gold and silver goblets - A number of gold and silver goblets was found on a shelf in a full-length, single-door cupboard. Again, upon observing them, Rivers recognized them as similar to those reported taken in a break which he had investigated. They were seized. There was probable cause to do so.

Knives - Tamash saw two sets of knives in velvet pouches in a drawer in a cabinet. He showed them to Rivers, who recognized them as items previously reported stolen. They were seized. There was probable cause to seize them.

Miscellaneous items - Among other items found within the motor home were (1) men's bracelets with stones in them; attached to the bracelets were price tags; (2) 15 pearl-handled, silver butter knives rolled up in a velvet

jewelry case, which were of the same type and description as ones reported stolen in a case Beland was investigating; (3) a small, cardboard box of gold jewelry, including silver and turquoise items, ladies' charm bracelets with dates of birth on the charms (these were items not typically found in a motor home in the quantities or of the type observed);(4) a set of 8 demitasse spoons; (5) several jewelry cases with different pieces of costume jewelry in them; (6) silver service items found in the bottom drawer of a cabinet. There was probable cause to seize them.

24. At all times during the search, the searchers were aware that, pursuant to the search warrant, they were looking for gold and silver items. They knew, some individually and all collectively

through their vicarious knowledge, that various items of jewelry, watches, silver and gold had been taken in the O'Malley and Pendergast breaks. None of the items of jewelry, gold and silver specifically listed in the search warrant was found during the search.

25. With the search over, Beland filled out the return on the search warrant as follows: "I received this search warrant Sept. 11, 1980, and have executed it as follows: On Sept. 11, 1980, at 6:23 o'clock p.m., I searched the premises described in the warrant. The following is an inventory of the property taken pursuant to the warrant: Nothing seized pursuant to this warrant."

26. On September 12, 1980, Beland swore before Assistant Clerk-Magistrate Eldredge that "this inventory is a true and detailed account of all the property taken by me on the warrant."

27. Thereafter, on September 25, 1980, the return on the search warrant was amended by Beland, before the same Assistant Clerk-Magistrate, by an addition reading as follows:

> "On 9-25-80, I have brought attachments 1 and 2 to Clerk William Eldredge for inclusion to this warrant. These attachments 1 and 2 represent items seized during service of this warrant but not listed on warrant."

At that time there were attached to the warrant two typed sheets, marked 1 and 2 respectively, captioned "List of the following items taken from mobile home on property of George Upton: The following items seized from 5 Jefferson Avenue, W. Yarmouth on 9-11-80 between the nours of 1823 to 2100."

28. There then follows a detailed description of the items seized, including "Large quantity of fireworks", "18 Mint proof set of (described)

coins", a "German double/ edge knife "Haco" made in Berlin," and "(38) women's watches, various brands."

29. Beland's "Return" on September 12, 1980, was made after he had discussed the entry with the Assistant Clerk-Magistrate, who advised him to file it as he did.

30. After the items seized had been inventoried in detail, an Assistant District Attorney advised Beland to file the list.

The Defendant's Contentions

31. Alleged material misrepresentations.

Upton attacks the search and seizure in part on the ground that "there are material misrepresentations of fact in the warrant." (Presumably, the affidavit in support of the application

is meant, rather than the search warrant itself. See "Memorandum in Support of Motion to Suppress," p. 20) I find no material misrepresentations of fact in the affidavit. On the facts which I have found, Beland carefully and accurately reported in detail the telephone call which he had received, and other events of the day. At no place in the affidavit did he state or necessarily imply that the unidentified caller was Lynn Alberico. He simply and carefully reported his statement to the caller that he knew who she was and her response. I find no false statements of fact. Even if there are any factual inaccuracies in the affidavit, in any event I find no deliberate falsehood by the affiant (as opposed to the informant), nor any false statements made by the affiant with reckless

disregard for the truth. I do not find that Beland either entertained serious doubts as to the truth of any statements made by him in the affidavit, or that he had obvious reason to doubt the veracity of an informant or the accuracy of the informant's reports. Even if Beland were found to have had reasons to doubt the female caller's statements, I am not persuaded that under the circumstances the police had the means available to establish the veracity of the information without such delay as would defeat a legitimate law enforcement purpose. The fact is that Beland did corroborate the information to the extent he could, which I find was a reasonable effort under the circumstances, having in mind what was being observed could reasonably be considered as an apparent attempt to

move materials out of the motor home. Within the guiding principles recently set forth in Commonwealth v. Nine Hundred & Ninety-Two Dollars, Mass. Adv. Sh. (1981) 1420, Beland's conduct was not such as to require me to strike down this warrant, and I decline to do so.

32. Facial insufficiency of the affidavit.

Upton also contends that the affidavit supporting the application for the search was insufficient on its face to support a finding by the magistrate of probable cause. On the contrary, I find and rule that a neutral and detached magistrate had adequate information revealed on the face of the affidavit to warrant a finding of probable cause for its issuance.

In applying the test of Aguilar v. Texas, 378 U.S. 108 (1964) and its

extensive federal and state progeny, a motion judge should be ever mindful that the affidavit presented to the magistrate should be viewed with a commonsense, nontechnical, ungrudging and positive attitude. A finding of probable cause, while demanding more than mere suspicion, requires less evidence than that which is necessary to justify a conviction.

"In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949).

Furthermore, if the police are to be encouraged to use the warrant procedure

as they did here, "it seems good policy to allow a certain leeway or leniency in the after-the-fact review of the sufficiency of applications for warrants." Commonwealth v. Corrandino, 368 Mass. 411, 416 (1975).

With these guidelines in mind, I conclude that the Aguilar test has been met by the affidavit before me.

On my reading of the Beland affidavit, it reasonably informed a detached and neutral magistrate of sufficient underlying facts and circumstances (including personal observation) which had warranted the affiant in concluding that the informant was credible or her information reliable, and from which the informant had concluded that the stolen property was where it was claimed to be. There is sufficient in the affidavit, in my

view, for the magistrate to conclude that there was probable cause to believe that the stolen articles listed by incorporation and attached reference in the application would be found in the motor home. Corroboration of certain alleged facts stated by the informant had been accomplished; reasonable, but not compelled inferences, were available, and could be drawn.

33. The scope of the search.

Finally, Upton argues that the scope of the search went far beyond the parameters of the search warrant; that, even if the warrant were valid, it could not provide the basis for the seizure of items which were not named in the warrant itself, and which were not themselves contraband. The court is not so persuaded. Given the validity of the

search warrant, as previously ruled, the police officers were lawfully in the motor home. I find that their search in the motor home was not a general, exploratory search; on the contrary, it was a search for the objects set forth and specified in the warrant. To that end the officers were entitled to search, as they did, in places and locations where such items would be likely found. They were not restricted merely to objects which they observed in the open. They were justified in looking for the objects and items in places which would be likely receptacles for them, having in mind that the sought-after items were known to have been stolen. That they did not find the property which they were specifically seeking does not disable them from seizing other items which they came upon

during the search for the warrant items, if the items found fall within certain legal requirements for seizure, such as: that the item is contraband, or that the item is recognized as one which the police know or have probable cause to believe has been stolen, or is evidence of some other crime.

It is clear that if the execution of a search warrant discloses items of contraband - articles which it is unlawful for one to have in his possession - they may be seized although not described in the warrant. Commonwealth v. Wojcik, 358 Mass. 623, 628 (1971). Those articles here seized which fell into that category - e.g. the double-edged knife - were properly seized although not specified in the warrant.

Likewise, if the execution of a search warrant discloses articles which have been stolen, such articles may be seized, although they are not described in the warrant, if the officer making the seizure then knew or had probable cause to believe that the articles were stolen. Wojcik, id. Commonwealth v. DeMasi, 362 Mass. 53, 58 (1972). Here I specifically find that the seizing officers had probable cause to believe that the items which they seized had been stolen, the basis being, as already outlined, their knowledge as a result of their investigations of the types of items very recently stolen; their awareness that articles like those in the motor home had been recently stolen in the area; their relation of those items to the specific breaks; their knowledge of the items found in the

Kelleher motel room search and their link to the Pengergast-O'Malley breaks, and to Upton; their observations of activity at the motor home; their knowledge of Upton's record and his reputation; and their observation of a large number of valuable goods in the motor home.[4/] The combination of these and the other factors above described justified the seizure of the goods taken. In the court's view this phase of the matter falls within the principles enunciated in the closely analogous case of Commonwealth v. Ventola, 1 Mass. App. Ct. 459 (1973).

4/ That there was another plausible explanation for their presence in the motor home - flea market - does not negative the police's plausible, but not necessary, inference that the goods were stolen.

34. In short, I find and rule that the searching officers had a prior justification for the entry into the motor home and that, in addition to the contraband items, they properly seized other types of evidence which they recognized to be plausibly related as proof to criminal activity of which they were already aware.

35. I am also of the opinion, and so rule, should it become material, that the seizures were also valid and justified within the "plain view" tests more recently set forth in Commonwealth v. Bond, Mass. Adv. Sh. (1978) 1241, Commonwealth v. Accaputo, Mass. Adv. Sh. (1980) 1009, and Commonwealth v. Cefalo, Mass. Adv. Sh. (1980) 1877, 1889. While I am inclined to the view that it is unnecessary, in the case of stolen goods (see discussion in United States v.

Liberty, 616 F.2d 34, 36 [2d Cir. 1980]), to go beyond the clear teaching of Wojcik and DeMasi, nevertheless in this case the "inadvertence" requirement for the "plain view" exception is made out in that I find that the police officers did not know or expect that they would find the articles which they did find in the motor home; they were looking for other, albeit similar, items.

CONCLUSION

The defendant's motion to suppress in each of Criminal Nos. 40921-40925 is denied.5/

5/ Despite a forceful argument in Upton's brief (pp. 2-8) to the contrary, this judge has serious misgivings whether he should have heard evidence on this current motion to suppress. The motion to suppress the very same evidence, which is the subject matter

(footnote continued)

James P. Lynch, Jr.
Justice of the Superior
Court Department

Dated: September 11, 1981

(footnote continued)

of the earlier indictments, was heard and denied by Judge Dolan, who made findings of fact. That new indictments based in part on the same physical evidence have now been handed up, that Judge Dolan may not have heard certain witnesses or evidence now provided by Upton, that new contentions of invalidity are now pressed by successor counsel, or that further judicial decisions in the search-and-seizure act are now available, should not provide the basis for what is essentially a "second bite at the apple" by Upton. Given the scarcity of judicial resources to try criminal cases - let alone motions to suppress - regurgitating essentially the same witnesses and evidence on the same basic issues is unduly profligate and wasteful. It is not legally compelled. Commonwealth v. Richmond, Mass. Adv. Sh. (1980) 167, 168. Moreover, the spectre of two or more different judges making conflicting findings and rulings on the same evidence presents obvious problems.